STATE OF MICHIGAN

COURT OF APPEALS

RESIDENTIAL FUNDING CO, LLC, f/k/a RESIDENTIAL FUNDING CORPORATION, Plaintiff-Appellee, v GERALD SAURMAN, Defendant-Appellant.	FOR PUBLICATION April 21, 2011 No. 290248 Kent Circuit Court LC No. 08-011138-AV
BANK OF NEW YORK TRUST COMPANY, Plaintiff-Appellee, v COREY MESSNER, Defendant-Appellant.	 No. 291443 Jackson Circuit Court LC No. 08-003406-AV Advance Sheets Version

Before: WILDER, P.J., and SERVITTO and SHAPIRO, JJ.

WILDER, P.J. (*dissenting*).

Because I conclude that, pursuant to MCL 600.3204(1)(d), Mortgage Electronic Registration Systems, Inc. (MERS), was "the owner . . . of an interest in the indebtedness secured by the mortgage" at issue in each of these consolidated appeals, I respectfully dissent.

I

Defendant Gerald Saurman (Saurman) and defendant Corey Messner (Messner) executed promissory notes in exchange for loans from Homecomings Financial, LLC (Homecomings). To secure the repayment of the loans, Saurman and Messner executed mortgage agreements that encumbered the properties purchased with the money loaned to them by Homecomings. The mortgage agreements provided that MERS, "solely as a nominee for [Homecomings] and [Homecomings'] successors and assigns," was the mortgagee under each security instrument and held the legal interests to the properties, and that MERS's interests under each security instrument, as nominee for Homecomings, included the right to foreclose and sell the properties. The mortgage agreements also provided that MERS had the obligation "to take any action

required of [Homecomings], including, but not limited to, releasing and canceling" the security instruments. Though it was not the mortgagee, as the lender, Homecomings retained an equitable interest in the mortgages.

Both Saurman and Messner defaulted on their payments, and MERS initiated nonjudicial foreclosure by advertisement under MCL 600.3201 *et seq*. MERS purchased the properties in sheriff's sales, and subsequently, quitclaimed Saurman's property to Residential Funding Co, LLC (RFC), and Messner's property to Bank of New York Trust Company (BNYT). After the redemption periods expired, RFC and BNYT each sought to obtain possession of the respective properties. During eviction proceedings, Saurman and Messner each challenged the foreclosure by MERS, asserting that MERS was not the servicing agent, did not own the indebtedness secured by the mortgage, and did not own an interest in the indebtedness secured by the mortgage as required by MCL 600.3204(1)(d). These arguments were rejected by both the district courts and the circuit courts, and this Court granted leave to appeal.

II

This Court reviews de novo rulings made on a motion for summary disposition including a circuit court's affirmance of a district court's ruling on a motion for summary disposition. *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 647; 761 NW2d 414 (2008); *First of America Bank v Thompson*, 217 Mich App 581, 583; 552 NW2d 516 (1996). Issues of statutory construction are questions of law, which this Court reviews de novo on appeal. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007). Statutory construction discerns and gives effect to the Legislature's intent. *Potter v McLeary*, 484 Mich 397, 410; 774 NW2d 1 (2009). In determining that intent, this Court first looks to the language of the statute. *Id*. The interpretation of the language must accord with the legislative intent. *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009). As far as possible, this Court gives effect to every phrase, clause, and word in the statute. *Id*. "The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Id*. (quotation marks and citations omitted). Courts read a statute as a whole, and individual words and phrases, while important, are read in the context of the entire legislative scheme. *Id*.

"The interpretation of a contract is also a question of law this Court reviews de novo . . . ." *DaimlerChrysler Corp v G-Tech Prof Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003). A contract must be interpreted according to its plain and ordinary meaning. *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008).

> Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations [or the provisions irreconcilably conflict with each other], factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. [*Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997) (citations omitted).]

See also *Shaw v Ecorse*, 283 Mich App 1, 22; 770 NW2d 31 (2009). A court may not rewrite clear and unambiguous language under the guise of interpretation. *Woodington v Shokoohi*, 288 Mich App 352, 374; 792 NW2d 63 (2010). Rather, "courts must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

III

MCL 600.3204 provides, in relevant part:

> (1) [A] party may foreclose a mortgage by advertisement if all of the following circumstances exist:
>
> (a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.
>
> (b) An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage; or, if an action or proceeding has been instituted, the action or proceeding has been discontinued; or an execution on a judgment rendered in an action or proceeding has been returned unsatisfied, in whole or in part.
>
> (c) The mortgage containing the power of sale has been properly recorded.
>
> (d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.

There are three categories of parties who may foreclose by advertisement under MCL 600.3204(1)(d): (1) the owner of the indebtedness secured by the mortgage; (2) the servicing agent of the mortgage; and (3) the owner of *an interest* in the indebtedness secured by the mortgage. Because we must give meaning to each of these phrases and each word in the phrases in order to give effect to the Legislature's intent, *Bush*, 484 Mich at 167, it is clear that the owner of an interest in the indebtedness secured by the mortgage, while accorded the same right to foreclose by advertisement, is a person or entity different from either the owner of the indebtedness secured by the mortgage or the servicing agent of the mortgage. To "own" means "[t]o have a good legal title; to hold as property; to have a legal or rightful title to . . . ." Black's Law Dictionary (6th ed), p 1105. "Owner" is defined as, "[the] person in whom is vested the ownership, dominion, or title of property; proprietor. He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases, even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right." *Id.* "Indebtedness" is defined as "[t]he state of being in debt" or "[t]he owing of a sum of money upon a certain and express agreement." *Id.*, p 768. The indebtedness secured by the mortgages are, in these cases, the promissory notes signed by Saurman and Messner. Thus, the owner of the indebtedness secured by the mortgage owns the debt or the notes. In these cases, the owner of the indebtedness is Homecomings.

The signature questions presented in these cases are what it means to own "an interest" in the indebtedness secured by the mortgage, i.e., to own an interest in the debt or the note, as opposed to owning the debt or the note, and what entity or person the Legislature meant to refer to when it permitted "the owner . . . of an interest in the indebtedness secured by the mortgage" to have the same ability as the owner of the indebtedness and the servicer of the mortgage to foreclose by advertisement. In general,

> [t]he right to foreclosure by advertisement is statutory. *Calaveras Timber Co v Michigan Trust Co*, 278 Mich 445, 450; 270 NW 743 (1936). Such foreclosures are a matter of contract, authorized by the mortgagor, and ought not be hampered by an unreasonably strict construction of the law. *Cramer v Metro S & L Ass'n*, 401 Mich 252, 261; 258 NW2d 20 (1977). Harsh results may and often do occur because of mortgage foreclosure sales, "but we have never held that because thereof, such sale should be enjoined, when no showing of fraud or irregularity is made." *Calaveras Timber Co*, [278 Mich] at 454. [*Church & Church, Inc v A-1 Carpentry*, 281 Mich App 330, 339-340; 766 NW2d 30 (2008), aff'd in part and vacated in part on other grounds 483 Mich 885 (2009).]

"Interest" is defined, in part, as "[t]he most general term that can be employed to denote a right, claim, title, or legal share in something. . . . The word 'interest' is used in the Restatement of Property both generically to include varying aggregates of rights, privileges, powers and immunities and distributively to mean any one of them." Black's Law Dictionary (6th ed), p 812. "Mortgage" is defined as "an interest in land created by a written instrument providing security for the performance of a duty or the payment of a debt." *Id.*, p 1009. Notably, "[t]he mortgage operates as a conveyance of the legal title to the mortgagee, but such title is subject to defeasance on payment of the debt or performance of the duty by the mortgagor." *Id.*, p 1010. In other words, the mortgagee's title is defeated when the debt is paid.

I would conclude that, as mortgagee, MERS owned a contractual interest in the indebtednesss. If the indebtedness is paid in conjunction with the note, MERS has the contractual obligation to cancel the security agreement because its title is defeated. If the indebtedness is not paid, however, MERS has the contractual right and obligation to exercise the rights granted to it by the mortgagors, including the right to foreclose by advertisement under the statute. In other words, MERS's interest in the indebtedness is derived from the fact that its contractual obligations as mortgagee were dependent on whether the mortgagor met the obligation to pay the indebtedness that the mortgage secured.

According to the security instruments, MERS was the nominee of Homecomings and held its status as mortgagee only in that capacity. "Nominee" is defined as "[a] person designated to act in place of another, usu. in a very limited way . . . [a] party who holds bare legal title for the benefit of others . . . ." Black's Law Dictionary (9th ed), p 1149. Although Saurman and Messner each agreed that MERS held "only legal title to the interests granted" in the respective security instruments, the security interest was specifically created to secure performance by Saurman and Messner of the obligation each undertook in a note, namely, to repay the debt. In other words, the security interest created was specifically linked to the debt and specifically created to ensure payment of the debt. Saurman and Messner each agreed that "if necessary to comply with law or custom, MERS (as nominee for [Homecomings] . . . , ha[d]

the right . . . to take any action required of [Homecomings] including, but not limited to, releasing and canceling" the security instruments.

By conveying the right to take *any* action required of it, Homecomings gave, and MERS received, a greater interest than just an interest in the property as security for the note, namely it gave the contractual right to act for the benefit of Homecomings. MERS's interest in the debt reflected by the note is inextricably linked to its obligations under the mortgage. For example, if Saurman and Messner had satisfied their notes, MERS would have been obligated to cancel the security instruments on behalf of Homecomings. Alternatively, if Saurman and Messner had elected to sell their properties without Homecomings' prior written consent, MERS would have had the right to exercise on behalf of Homecomings the option to require immediate payment in full of all sums secured by the security instruments. Failure to pay in full would have then given MERS the right to invoke remedies such as foreclosure of the properties, as provided in the security instruments. In short, MERS was the contractual owner of an interest in the notes, which were secured by the mortgages.

There is no dispute that, had Homecomings retained its status as mortgagee, it would have been entitled to foreclose by advertisement upon the defaults by Saurman and Messner. Nothing in MCL 600.3204 precludes a noteholder-mortgagee from delegating, by contract, some of its rights and responsibilities under the statute and the mortgage to a nominee that, while not the owner of the note and, therefore, not the holder of an interest in the note identical to that of the noteholder, nevertheless, clearly has an interest in whether the note is paid or defaulted on.[1]

Finally, it bears noting that, contrary to the majority's contention that permitting MERS to foreclose by advertisement could potentially subject the mortgagors to a double recovery for the same debt, MCL 600.3105(2) forces an election of remedies, so that Homecomings would be precluded from the recovery of any debt secured by the mortgage if a foreclosure proceeding had already been initiated by MERS.

I would conclude that MERS did have the authority to foreclose on defendants' properties by advertisement. I would affirm in each case.

/s/ Kurtis T. Wilder

---

[1] In this regard, MERS's interest in the indebtedness is similar to the interest held by one who possesses an easement right. "[A]n easement is a [sic] not a possessory right." *Terlecki v Stewart*, 278 Mich App 644, 659; 754 NW2d 899 (2008). Rather, "[a]n easement is, by nature, a limited property *interest*. It is a right to use the land burdened by the easement rather than a right to occupy and possess [the land] as does an estate owner." *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 378-379; 699 NW2d 272 (2005) (quotation marks and citations omitted; emphasis added and deleted). Because one can "own" an easement right and have an interest in land without owning the land, so, too, can MERS "own" an interest in the note held by Homecomings without actually owning the note.